



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 03-3889
December 5, 2003

Mr. Donald J. Evans, Esq.
1300 17th Street, 11th floor
Arlington, VA 22209

RE: Corr Wireless Communications, LLC, Auction No. 44, Waiver Request

Dear Mr. Evans:

This letter responds to the waiver request¹ filed on behalf of your client, Corr Wireless Communications, LLC ("Corr Wireless"), seeking waiver of Commission rules to allow it to qualify as a very small business in the 698-746 MHz band auction ("Auction No. 44"), which closed on September 18, 2002.² Specifically, Corr Wireless requests a partial waiver of section 27.702³ of the Commission's rules to exclude \$29 million dollars in capital gains resulting from the sale of its landline telephone company from the gross revenue calculations used to determine bidding credit eligibility for Auction No. 44.⁴ For the reasons cited below, we deny the waiver request.

¹ Corr Wireless Communications, LLC, FCC Form 175, Contingent Waiver Request, filed on May 7, 2002 ("Waiver Request").

² Lower MHz Band Auction Closes; Winning Bidders Announced, *Public Notice*, 17 FCC Rcd. 17,272 (2002) ("*Auction No. 44 Closing Public Notice*").

³ 47 C.F.R. §§ 27.702; 1.2110(b)(1). The Waiver Request cited the controlling interest standard in section 27.702 of the Commission's rules. We note that after the filing of the short-form application the gross revenue provision in section 27.702 was deleted as part of the conforming edits process because it was redundant with the gross revenues provisions contained in Part 1. See Amendment of Parts 1, 21, 22, 24, 25, 26, 27, 73, 74, 80, 90, 95, 100, and 101 of the Commission's Rules – Competitive Bidding, *Order*, 17 FCC Rcd. 11146 (WTB 2002).

⁴ Waiver Request at 1. Corr Wireless characterizes the \$29 million dollars as a "capital gain" or "gain" from the sale of its landline telephone company. The use of the term "capital gain" or "gain" by Corr Wireless suggests that the \$29 million dollars represents the profit over Corr Wireless' basis in the asset. Black's Law Dictionary, 7th Edition, West Publishing Co., 1997 (defines "capital gain" as the profit realized when a capital asset is sold or exchanged). However, other statements by Corr Wireless suggest that the figure represents gross revenue from the transaction. See Corr Wireless Communications, LLC, FCC Form 175, Exhibit C, Designated Entity Showing, filed on May 8, 2002 ("Corr Wireless Exhibit C"), at 2. Accordingly, it is unclear if the \$29 million dollars is the gross revenue from the sale of the landline telephone company or the profit received on the transaction.

1. Background

Parties seeking to participate in Auction No. 44 were required to submit a short-form application no later than 6 p.m. ET on May 8, 2002.⁵ Additionally, the Commission's rules provide applicants a limited opportunity to cure specified defects in their short-form applications and to resubmit a corrected application.⁶ For Auction No. 44, parties could resubmit corrected short-form applications no later than 6:00 p.m. ET on May 31, 2002.⁷

In order to qualify for a bidding credit for Auction No. 44, auction applicants must disclose and certify that their gross revenues for the preceding three years meet the standard set forth in section 27.702. Section 27.702 of the Commission's rules defines a very small business as "an entity that, together with its controlling interests and affiliates, has average gross revenues not exceeding \$15 million for the preceding three years."⁸ In assessing whether an applicant is eligible for the Commission's small business provisions, the Commission's controlling interest attribution rule requires that the gross revenues of the applicant, its controlling interests and their affiliates are attributed to the applicant.⁹ Additionally,

⁵ Announcing PN Auction of Licenses in the 698-746 MHz Band scheduled for June 19, 2002; Notice and Filing Requirements, Minimum Opening Bids, Upfront payments and Other Auction Procedures," *Public Notice*, 17 FCC Rcd 4935 (2002) ("Auction No. 44 Procedures Public Notice").

⁶ 47 C.F.R. § 1.2105(b)(2).

⁷ See Auction of Licenses for 698-746 MHz Band; Status of FCC Form 175 Applications to Participate in the Auction, DA 02-1213, *Public Notice*, 17 FCC Rcd. 9415 ("Auction No. 44 Status Public Notice"); see also Auction No. 44 Revised Schedule, License Inventory, and Procedures, *Public Notice*, 17 FCC Rcd 11935 (2002) ("Auction No. 44 Revised Schedule Public Notice"). The Wireless Telecommunications Bureau ("Bureau") issued the Auction No. 44 Revised Schedule Public Notice announcing that qualified bidders would be permitted to elect to terminate participation in Auction No. 44 and receive a full refund of their upfront payments. Additionally, the Bureau permitted all qualified bidders not departing from Auction No. 44 to select additional licenses and supplement their upfront payments pursuant to specified procedures. The Bureau took this action because qualified bidders could not have anticipated the changes in Auction No. 44 mandated by adoption of the Auction Reform Act. *Auction No. 44 Revised Schedule Public Notice* at 17 FCC Rcd at 11936; see also Auction No. 44 Revised Schedule, License Inventory, and Procedures, DA 02-1491, Petition for Reconsideration by Spectrum Holdings I, LP, *Memorandum Opinion and Order*, 17 FCC Rcd 14498, 14499 (2002).

⁸ 47 C.F.R. § 27.702 (2002). Additionally, a small business is defined as any entity with average annual gross revenues of not more than \$40 million for the preceding three years ("small business"), and an entrepreneur is defined as any entity with average annual gross revenues of not more than \$3 million for the preceding three years ("entrepreneur"). 47 C.F.R. § 27.702 (2002); Reallocation and Service Rules for the 698-746 Spectrum MHz Band (Television Channels 52-59), GN Docket 01-74, *Report and Order*, FCC 01-364, 17 FCC Rcd. 2153, ¶171 ("Lower 700 MHz Report & Order") (2002).

⁹ See Amendment of Part 1 of the Commission's Rules--Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 at 15323-27, ¶¶ 58-677 (2000) (modified by Erratum, DA 00-2475 (rel. Nov. 3, 2000) ("Part 1 Fifth Report and Order"); see 47 C.F.R. § 1.2110(c).

the gross revenues must be considered on a cumulative basis and aggregated.¹⁰ Section 1.2110 (n) of the Commission's rules defines "gross revenues" as "all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business . . ."¹¹ Thus, this definition requires that proceeds derived from capital, including all proceeds from the sale or conversion of capital be represented in the gross revenues of an applicant for the most recently completed fiscal years preceding the filing of the applicant's short form.¹²

Corr Wireless timely submitted its initial short-form application, which included the Waiver Request to exclude the capital gains in question. The short-form application sought a very small business bidding credit.¹³ Upon review, the Commission found Corr Wireless' initial short-form application incomplete.¹⁴ Corr Wireless resubmitted its short-form application on May 31, 2002.¹⁵ The resubmitted short-form application left it unclear as to whether the Corr Wireless disclosed the gross or net proceeds from the transaction at issue.¹⁶ Although Corr Wireless' short-form application to participate in Auction No. 40 was accepted, the Commission noted that the final resolution of the pending Waiver Request could ultimately affect Corr Wireless' eligibility for a bidding credit or the amount of the bidding credit it received.¹⁷

¹⁰ 47 C.F.R. § 1.2110(b)(1).

¹¹ 47 C.F.R. § 1.2110(n). This definition is consistent with the Black's Law Dictionary definition of "income," as well as how the phrase is commonly defined by the courts. *See Black's Law Dictionary*, 7th Edition, West Publishing Co., 1997. Black's Law Dictionary defines "gross income" as "Total income from all sources before deductions, exemptions, or other tax reductions." *See also City of Dallas v. Federal Communications Commission*, 118 F.3d 393, 398 (5th Cir. 1997) (" . . . gross revenue normally includes all revenue collected from any source.").

¹² 47 C.F.R. § 1.2110(n).

¹³ Corr Wireless Exhibit C at 1.

¹⁴ *Auction No. 44 Status Public Notice* at 17 FCC Rcd at 9416.

¹⁵ Corr Wireless was required to establish its eligibility for a bidding credit based on information it submitted to the Commission prior to the May 31, 2002 short-form application resubmission deadline. After the May 31, 2002 resubmission period deadline, applicants could make only minor changes or correct minor errors in their short-form applications. 47 C.F.R. § 1.2105(b)(2). If an applicant has not established eligibility for a bidding credit by the resubmission deadline, any change in the information required to establish an applicant's eligibility for a bidding credit would be an impermissible major change. *See Two Way Radio of Carolina, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 12035, 12039 ¶8 (1999) ("modification of an applicant's small business status [*i.e.*, bidding credit eligibility] does not constitute a minor change under our competitive bidding rules").

¹⁶ Waiver Request at 1-2; *see also supra* note 4.

¹⁷ *See Auction No. 44 Status Public Notice* at 17 FCC Rcd. at 9416; *Auction No. 44 Revised Qualified Bidders Notification*; 125 *Qualified Bidder*, DA 02-1933, *Public Notice*, 17 FCC Rcd. 15543 ("*Auction No. 44 Qualified Bidders Public Notice*"). Thus, the indication on the *Auction No. 44 Closing Public Notice* that its net bid obligation was 25 percent less than its gross bid obligation was conditional and the question of whether Corr Wireless is eligible for any level of bidding credit will be resolved at the long-form application stage. *See infra* note 27.

2. Discussion

In substance, Corr Wireless is requesting that certain income be excluded from the gross revenues of the pertinent years so that it may qualify for a very small business bidding credit.¹⁸ We find no merit in the reasons Corr Wireless offers for making an exception to the gross revenue test. In support of its Waiver Request, Corr Wireless argues that income resulting from the sale of its landline telephone company, Corr, Inc., should not be included in determining its bidding credit eligibility, and therefore, it should fall within the definition of a very small business rather than a small business. Corr Wireless characterizes the proceeds from the sale of its landline telephone company as a one-time gain from the conversion of capital assets and that such assets held by the applicant should be irrelevant in determining its bidding credit eligibility.¹⁹ Corr Wireless further argues that treating this gain as gross revenue would be contrary to the purpose of the Commission's bidding preferences for small businesses and is inconsistent with the Commission's decision not to adopt a total assets test.²⁰ In light of the broad definition of gross revenues, Corr Wireless does not dispute that the proceeds from the sale of the landline telephone company would be considered gross revenue under section 1.2110 (n) of the Commission's rules. Rather, Corr Wireless characterizes this as "an inadvertent quirk" of the rule that is contrary to the Commission's purpose in adopting a gross revenue test.²¹

In order to obtain a waiver of the Commission's competitive bidding rules, Corr Wireless must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative. As we explain below, we are not convinced that a grant of the waiver is warranted or would be in the public interest.

Historically, the Commission has used a gross revenues test for purposes of ascertaining eligibility for small business bidding credit.²² The *Part 1 Eighth Report and Order* recently reiterated that

¹⁸ In the *700 MHz Report and Order*, we adopted our standard schedule of bidding credits, representing the amount by which a bidder's winning bids would be discounted. 47 C.F.R. § 1.2110(f)(2) (An entity with average annual gross revenues not to exceed \$3 million would receive a 35 percent discount on its winning bids, an entity with average annual gross revenues not to exceed \$15 million would receive a 25 percent discount on its winning bids, and an entity with average annual gross revenues not to exceed \$40 million would receive a 15 percent discount on its winning bids.)

¹⁹ Waiver Request at 1.

²⁰ *Id.*, (citing to Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 388-89, ¶ 19 (1997) ("Part 1 Third Report and Order")).

²¹ Waiver Request at 1.

²² Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, WT Docket No. 97-

the Commission adopted a gross revenues test as its general standard for measuring the size of an entity for competitive bidding purposes, in part because such a standard provides “an accurate, equitable, and easily ascertainable measure of business size.”²³ At the same time, the Commission declined to add a total assets component to the test, concluding that the rules already prevent asset-rich applicants from taking advantage of the small business benefits, because, to the extent that their assets, or those of their controlling interests and affiliates, produce revenues, those revenues must be attributed to the applicant.²⁴ Further, the Commission noted that employing a total assets test carries administrative costs for the Commission and for applicants and raises difficult valuation issues while conveying insufficient additional benefit. The circumstances presented here, in fact, establish the validity of a gross revenues test and therefore show that application of the rule serves its underlying purpose. Specifically, the test captures the revenue obtained from this asset without a subjective valuation or undue administrative burden on the applicant.

As the Commission has held, bidding credits to designated entities not only help to achieve the objectives of Section 309(j), but also help to ensure that eligible designated entities have the opportunity to participate successfully in auctions for certain services.²⁵ The Commission has determined that use of this uniform gross revenue test is an essential element of the Commission’s small business provisions.²⁶ In light of the significance of this standard, allowing an exception in this instance would prejudice other applicants. Accordingly, with respect to Corr Wireless’ Waiver Request, the integrity of the competitive bidding process is best served by applying the designated entity provisions in a fair and consistent manner.

3. Conclusion

Based on the record before us, we are not persuaded that Corr Wireless has demonstrated that application of the Commission’s rules in its case would frustrate the purpose of the Commission’s small

82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5699-5700, ¶¶ 19-21 (1997) (“*Part 1 Notice of Proposed Rule Making*”).

²³ Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *Eighth Report and Order*, FCC 02-34, 17 FCC Rcd. 2962, ¶2 (rel. February 13, 2002)(citing *Part 1 Third Report and Order*, 13 FCC Rcd at 388-89, ¶ 19)(“*Eighth Report and Order*”).

²⁴ *Eighth Report and Order*, 17 FCC Rcd. 2963-64, ¶ 3.

²⁵ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, FCC 94-61, 9 FCC Rcd. 2348, ¶ 242 (1994); Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Inquiry*, 17 FCC Rcd 25554, 25556-7, ¶ 4-7 (2002); Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Proposed Rulemaking*, FCC No. 03-222, ¶ 3 (rel. October 6, 2003).

²⁶ *Part 1 Third Report and Order*, 13 FCC Rcd at 390, ¶ 22).

Mr. Donald J. Evans
Page 6

business provisions, nor do we find that Corr Wireless presented unique circumstances sufficient to justify the grant of a waiver. Therefore, Corr Wireless' Waiver Request is denied.²⁷ This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.

Sincerely,

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

²⁷ 47 C.F.R. § 27.702 (2002). As noted previously, based upon inconsistent statements made by Corr Wireless, there is insufficient information to determine whether Corr Wireless is eligible for a small business bidding credit. Consistent with Commission rules, the question of whether Corr Wireless is eligible for a bidding credit will be resolved at the long-form application stage. Finally, we note that we need not address here Corr Wireless' wholly unsubstantiated assertion regarding the Commission's treatment of "swapped properties" because in the instant case Corr Wireless has not argued that its property was swapped. Further, even if Corr Wireless' unsubstantiated assertion were correct, such a situation is distinguishable from the facts before us in which Corr Wireless received funds, including a profit, from the sale of its landline telephone company. Corr Wireless Exhibit C at 2.